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FEDERAL ELECTION  
COMMISSION

1 2010 JAN 11 PM 12:26 BEFORE THE FEDERAL ELECTION COMMISSION

3 )  
4 In **CELA** of )

5 )  
6 MUR 6176 )

7 BENTLEY B. RAYBURN )

8 COMMITTEE TO ELECT )

9 RAYBURN FOR CONGRESS )

10 AND LOREN E. SHANNON )

11 AS TREASURER )

12 RALPH BRADEN, PRESIDENT, )

13 HOUSING AND BUILDING )

14 ASSOCIATION OF COLORADO )

15 SPRINGS AND THE PIKES PEAK )

16 REGION )  
17 )

CASE CLOSURE UNDER THE  
ENFORCEMENT PRIORITY  
SYSTEM

18 **GENERAL COUNSEL'S REPORT**

19 Under the Enforcement Priority System, matters that are low-rated

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21 are forwarded to the Commission with a recommendation for dismissal. The  
22 Commission has determined that pursuing low-rated matters, compared to other higher-rated  
23 matters on the Enforcement docket, warrants the exercise of its prosecutorial discretion to  
24 dismiss these cases. The Office of General Counsel scored MUR 6176 as a low-rated matter.

25 In this matter, the complainant, Matthew J. Werner, states that Bentley B. Rayburn, a  
26 candidate in Colorado's Fifth Congressional District's 2008 primary election, and his  
27 campaign committee, the Committee to Elect Rayburn for Congress and Loren E. Shannon,  
28 in his official capacity as treasurer ("Rayburn Committee"), failed to disclose an in-kind  
29 contribution allegedly received from the Housing and Building Association of Colorado  
30 Springs and the Pikes Peak Region ("HBA") in the form of a poll conducted in May of 2008.  
31 According to the complainant, candidates Bentley Rayburn and James Crank, Rayburn's  
32 primary opponent, entered into a written agreement with HBA's polling organization with

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1 the stated objective of determining whether Rayburn or Crank had the best chance of  
2 unseating incumbent Doug Lamborn<sup>1</sup> in the general election. According to the agreement, if  
3 one of the candidates received popular support at a level at least 4% higher than his  
4 opponent, the latter would withdraw from the primary election race. The complainant alleges  
5 that HBA paid for the poll and that, while Crank reimbursed HBA \$3,750 for his share of the  
6 polling costs and disclosed the disbursement on his 2008 Pre-Primary Report, the Rayburn  
7 Committee's reports failed to account for its costs, as required by 2 U.S.C. § 434(c).<sup>2</sup>

8 In response, the Political Action Committee of the Housing and Building Association  
9 of Colorado Springs and the Pikes Peak Region ("HBA PAC")<sup>3</sup>, stated that the complaint  
10 should have been directed to HBA PAC, not HBA, as the PAC was the entity that had  
11 conducted the poll.<sup>4</sup> Replying to the complainant's allegation that the cost of the poll  
12 constituted an in-kind contribution to the Rayburn campaign, HBA PAC states that it did not  
13 intend to make such a contribution to either the Rayburn or the Crank committees, because  
14 the committees agreed to reimburse the PAC for the costs of the poll. However, HBA PAC  
15 concedes that the poll's methodology was flawed, as it "was not conducted within the  
16 timeframe and parameters agreed upon by the two candidates and HBA PAC." Due to the  
17 poll's apparent deficiencies, HBA PAC determined that it would not release the results of the  
18 poll and, for the same reasons, the Rayburn campaign refused to "accept or take possession"

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<sup>1</sup> Mr. Lamborn's race for re-election was successful.

<sup>2</sup> Ultimately, candidate Hal Bidlack was chosen as the Democratic nominee.

<sup>3</sup> HBA PAC was not notified as a respondent because the PAC was not named in the complaint. Nevertheless, HBA PAC chose to file a response, which included an affidavit by its president.

<sup>4</sup> HBA PAC explains that it is a separately incorporated entity with its own governing board and funding arrangements. Attached to HBA PAC's response are two Colorado state documents designating HBA and HBA PAC, separately, as non-profit state corporations.

1 of the poll. Therefore, HBA PAC concluded that the Rayburn campaign was not liable for  
2 any of the costs of the poll.<sup>3</sup> In view of the circumstances, HBA PAC asserts that it did not  
3 make an in-kind contribution to the Rayburn campaign, nor did the Rayburn campaign  
4 receive a reportable benefit or contribution.

5 HBA PAC's response also includes an affidavit by its president Kevin J. Walker,  
6 which notes that HBA PAC operates as a local PAC that contributes only to local candidates.  
7 A review of the FEC website indicates that the HBA PAC is not a federally-registered  
8 committee.

9 In its response, the Rayburn Committee states that HBA PAC paid for and conducted  
10 the poll, but that it never used the poll, because of significant defects and irregularities in the  
11 polling process which, it suggests, operated to the benefit of Rayburn's primary opponent,  
12 Jeff Crank. According to the Rayburn Committee, HBA PAC informed the Rayburn and  
13 Crank committees that, because of these alleged defects, the PAC had decided not to release  
14 the results of the poll and notified the committees that the poll was HBA PAC's property.  
15 Finally, the Rayburn campaign maintains that contrary to the complainant's allegations,  
16 because the Rayburn Committee did not receive, much less utilize, any of the polling data, it  
17 could not, and did not, receive a reportable benefit from the poll.

18 It appears that HBA PAC, a corporation, "fronted" the expenses to pay for the poll  
19 with the intention of recouping the proceeds after the poll was completed. The Federal  
20 Election Campaign Act of 1971, as amended, prohibits the making and acceptance of

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<sup>3</sup> The Crank campaign, however, according to HBA PAC, "made use" of the poll, despite the Crank campaign's alleged knowledge of the poll's deficiencies. Therefore, HBA PAC requested that the Crank campaign pay its proportionate share of the poll. As noted in the complaint, the Crank committee's financial reports disclose the payment.

1 corporate contributions, including extensions of credit, unless such credit is extended in the  
2 ordinary course of business. See 2 U.S.C. § 441b(a) and 11 C.F.R. §§ 100.55 and 116.3(c).  
3 There is no indication that HBA PAC is in the business of conducting polls; to the contrary, it  
4 appears to be devoted to housing issues, and describes its mission as "helping to elect  
5 candidates to local and state offices that are advocates for private property rights, are pro  
6 business, free market, and advocates for a growing vibrant community." See  
7 <http://www.cahba.com/icwa281w2/html/committees.html>. Thus, but for the contested  
8 primary election in Colorado's Fifth Congressional District, HBA PAC probably would not  
9 have conducted the poll at issue. The amount at issue in this case is relatively small and the  
10 poll did not seem to have had a substantial effect on the primary election race. Thus, in  
11 furtherance of the Commission's priorities and resources, relative to other matters pending on  
12 the Enforcement docket, the Office of General Counsel believes that the Commission should  
13 exercise its prosecutorial discretion and dismiss the matter. See *Heckler v. Chaney*, 470 U.S.  
14 821 (1985). Additionally, we intend to remind the HBA PAC of its obligation to comply  
15 with the Act and the Commission's regulations, including those pertaining to corporate  
16 contributions, as they relate to extensions of credit.

**RECOMMENDATIONS**

The Office of General Counsel recommends that the Commission dismiss MUR 6176, close the file, and approve the appropriate letters. Additionally, this Office recommends reminding the Political Action Committee of the Housing and Building Association of Colorado Springs and the Pikes Peak Region of its obligation to comply with the Act and the Commission's regulations, including those pertaining to corporate contributions, as they relate to extensions of credit.

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1/8/10  
Date

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